

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 896/2020

In the matter between:

PEARL ZEEMAN KAHN N.O.

**Applicant**

and

**CEDRIC EROL ZEEMAN**

**1<sup>st</sup> Respondent**

**MPHETSENI CO-OPERATIVE SOCIETY**

**2<sup>nd</sup> Respondent**

**THE MASTER OF THE HIGH COURT  
OF ESWATINI**

**3<sup>rd</sup> Respondent**

**REGISTRAR OF DEEDS.**

**4<sup>th</sup> Respondent**

**THE ATTORNEY GENERAL**

**5<sup>th</sup> Respondent**

**Neutral Citation:** *Pearl Zeeman Kahn N.O V Cedric Erol Zeeman & 4  
Others (896/2020)[2020] SZHC 22 (26<sup>th</sup> February,2021).*

**CORAM : MAPHANGA J**

**HEARD : 23<sup>rd</sup> May 2020**

**DELIVERED: 26/02/2021**

**Summary:** *Civil Law - Applications - Dispute over certain disputed property- Interim interlocutory interdict sought to preclude interim disposal of the property - Administration of Estate -*

*Executor seeking to enforce ius in personam ad rem acquirendam held by the - deceased - whether vested in the estate upon his demise - disputed underlying oral agreement for sale of an identified surveyed but not subdivided portion of land - such a transaction not invalid or unenforceable; such a transaction not registrable nor a sale of land in law in terms of Section ... of the Deeds Registry Act - agreement creating an enforceable obligation on the landowner and correlative personal right to transfer upon fulfilment . of suspensive conditions - Disputes of fact arising necessitating referral of certain factual issues regarding the transactional history pertaining to the disposition of the property to oral evidence - No*

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## JUDGMENT

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MAPHANGA J

- [1] The Zeeman family is has been running an enterprise comprising of a highly prominent public passenger transport enterprise in the Kingdom spanning several decades. The business was run by the family patriach the late Patrick Moses Zeeman. It is common cause that during his lifetime around 1994 he became interested in a surveyed but undivided parcel of land situated on farmland (Farm No 1150) in the Malkerns area (in the Manzini region). It is common cause that the property was at that time designated Lease No. 8 (over Farm No. 1150) in its fullest extent measuring 23, 0500 Acres (9,3276 hectares) (the Property)). The farm was owned and registered in the name of the 2<sup>nd</sup> Respondent, a co operative society registered in terms of the Coperative Societies legislation in the country. It is this property and its derivative entities that are the centre of this dispute which has arisen between members of the Zeeman family.
- [2] There is a survey diagram that has been placed before the court in the application papers in respect of the property in question. It is survey

diagram SG 90/67 bearing the date that was issued - the 2th September 1967. Nothing of controversy turns on this document except that it forms the key or material background documents from which the transactional history of the property is sought to be mapped by the contenders in the dispute.

- [3] The dispute centres around how the property in question came to be in the family proprietary 'interests' and its ultimate acquisition by the 2<sup>nd</sup> Respondent which has given rise to the litigation. I use the choice of words advisedly because much remains in dispute as to the nature and vestiture of the relative proprietary interests or rights as pertains the property and as to the acquisition of such rights or interests given the peculiar facts of this case. This application is being brought by the Applicant - Ms Pearl Zeeman- Kahn. She has deposed to the founding affidavit in which she sets out her cause in her nominal capacity.
- [4] It is common cause that the applicant is the Executor (dative) in the estate of the late Patrick Moses Zeeman ('the deceased'). Mr Patrick Zeeman died intestate on the 14 December 2006. As evidence of her status the Applicant attaches the Letters of Executorship to this effect issued by the Master of the High Court dated 17<sup>th</sup> August 2007 as pertains the Estate No EH 19/2007. The applicant and the 1<sup>st</sup> respondent are siblings of the late Patrick Zeeman.
- [5] According to the applicant's version, the late Patrick Zeeman entered into an oral agreement in regard to the property then known as Lease No.a in terms of which the deceased 'purchased' the said property from the 2<sup>nd</sup> Respondent. A diagram of the said Lease No.a as it was designated then is annexed as Z2 to the applicant's affidavit.
- [6] According to the applicant, the deceased paid a sum of E137,000.00 (One hundred and Thirty Seven Thousand Emalangeni) by depositing a cheque into the account of the Co-operative) then held at STANBIC as it was then known (the predecessor of Standard Bank of Swaziland) and has attached as Annexure Z3 a deposit slip together with a letter allegedly issued by the 2<sup>nd</sup> Respondent's officers, as evidence of this transaction, to her founding affidavit. I return to the import and detail of the contents of these documents later in this judgment as they are central in the body of evidence placed before this court in this dispute.
- [7] The essence of the rest of the applicant's case in regard to this agreement is that the formalities enabling the transfer of the property were not feasible because in 1994 (and this feature of the land in question is not in dispute) the said property although fully surveyed in its

extent, was not yet a separate subdivided unit of land capable of transfer and as such did not have a dedicated separate title deed to enable its disposition or registration of transfer. This situation persisted until the deceased demise in 2006 without the envisaged transfer having taken place.

[8] It emerges as common cause that the 2<sup>nd</sup> Respondent Co-operative subdivided the farm of which the property described as lease 8 to be subdivided along the lines and configuration of the said Lease 8 from which subdivision the property was designated as Portion 3 of Farm No.1150 with its own certificate of registered title.

[9] In setting out the essential circumstances and history to ground the application the applicant relates how the first respondent became involved by virtue of her nomination together with the first respondent by their kinsmen to pursue and procure the transfer of the property to the Estate posthumously from the 2<sup>nd</sup> Respondent enabling the addition of the property in the inventory of assets of the Estate. To this end she attaches a sworn statement (she terms 'an affidavit) which she states was given by her uncle one Robinson Zeeman (now deceased) in 2013 to facilitate this process. She attaches this statement as Annexure 24, Its contents merit restatement:

**"AFFIDAVIT**

**I, Robinson Zeeman, in my capacity of being a younger Sibling of Stanislaus Fishy Zeeman and as executor of his Estate, I hereby" inform the Mphetseni Farmers Corporation that CEDRIC EAROL ZEEMAN will be elected to attend all such meetings on the family' behalf and therefor, if he is not available to attend such meetings as requested, his elder sister PEARL P. ZEEMAN(Kahn) will be able to stand in on his behalf and they will report to the family the outcome of such meetings or changes, if any.**

**SIGNED ON THIS .....DAY OF OCTOBER 2013**

**ROBINSON ZEEMAN**

**DATE**

WITNESS: \_\_\_\_\_"

(sic)

I shall *revert* to the significance of these documents further in this judgment.

- [10] The applicant further states that there were impediments to the winding up of the estate and in particular the process of investigating and collating the estate assets. She cites the outstanding transfer of the property in dispute as one of the causes of the delay in finalising the estate which she describes as *vast* in terms of the assets vesting in it.
- [11] I note however that on its face this 'affidavit' alludes to the estate of the late Stalinslaus Fishy Zeeman and the signatory's capacity as as the said Mr Fishy Zeeman's younger sibling. It emerges from the papers as common cause that the said Stalinslaus Fishy Zeeman whose name and role features in this application, was a different person form the deceased; the late Patrick Moses Zeeman. I therefore fail to see its relevance and connection to this matter in so far as the document also adverts to the nomination of the applicant and first respondent in relation to the estate of the late Stanilslaus Zeeman and not the deceased. It does not seem to assist the applicant in any way. Its status is in question. This statement also makes no reference to the subject matter and nature of the business that the first respondent and applicant were being assigned to undertake with the 2<sup>nd</sup> Respondent on behalf of 'the family' What is plain to see from the document is whatever this mission was, it had to do with the Estate of the late Stanislaus Fishy and not the deceased's estate.
- [12] The nub of the applicant's application is that during 2019 she and the rest of the beneficiaries of her father's estate discovered that sometime during 2019 the first respondent had surreptitiously caused the property

in question to be transferred to himself. She further alleges that not only did the first respondent procure the transfer fraudulently but that he had done so by stealth; and in privately dealing with the co-operative, he concealed his machinations from the rest of the family and the Master of the High Court. Applicant attaches a copy of the relative DEED OF TRANSFER NO. 742/2019.

[13] The applicant states that she together with her sisters and co beneficiaries; Jessica and Sharon Zeeman confronted the first respondent about the transfer of the land and short of denying the illegal transfer, the first respondent allegedly sought to placate the applicant and his siblings by offering them E30,000.00 each - a bribery in the applicant's view. She claims to have refused to take this money but the first respondent caused the said sums to be deposited into her sister Sharon's bank account.

[14] It is common ground that during 2019 the first respondent carried out further subdivision of the property (the said Portion 3 -formerly Lease 6) and that one of the portions yielded by the subdivision was Portion 4 of Farm 1150 measuring 1,1507 hectares and that the said Portion 4 was subsequently sold and transferred by the first respondent to a third Party one Zama Michael Kunene. The relative DEED OF TRANSFER (DT NO. 17/2020 has also been attached as 26 in this application dated 13<sup>th</sup> January 2020.

[15] In her Notice of Motion the applicant seeks a series of interim and final interdicts both prohibitory and mandatory in effect. The relief is in two parts, Part A being in the form of interim relief pending the main application for final relief in Part B. In that regard the following relief is prayed for:

**Part A.**

1.1.1.1.

- 1. That the timelines and forms of service in the institution of proceedings be dispensed with and that this matter be heard as one of urgency;**
- 2. That pending the outcome of the relief set out more fully in PART B of the application;**

**2.1 The 1<sup>st</sup> Respondent be interdicted and restrained from alienating, encumbering, subdividing and/ or dealing in any manner whatsoever with the property to wit; Portion 3 Farm No. 1150, situate in the District**

of Manzini, Eswatini, alternatively the Remainder of Portion 3 of Farm No.1150, situate in the District of Manzini, Eswatini.

3. That prayer 2 above operates with immediate and interim effect pending the final determination of the application;
4. Costs of Suit; and
5. Such further and/ or alternative relief;

And;

Part B.

1. Directing the first respondent to account to the Estate of the late Partrick Moses Zeeman, Estate No. EH 19/2007 (the Estate) for any monies received in the sale and/ or alienation of any portion of the property being Portion 3 Farm No. 1150, situate in the District of Manzini, Eswatini (the property);
2. The 4<sup>th</sup> Respondent is directed to cancel and expunge the transfer and registration of the property in the name of the 1<sup>st</sup> Respondent and register same in the name of Patrick Moses Zeeman;
3. The 3<sup>rd</sup> Respondent is directed to include the property in the inventory of assets belonging to the Estate and to deal with the property in terms of the Administration of Estate Act of 1902 (the Act);
4. Alternatively to prayer 3, that the Executors of the Estate of the late Patrick Moses Zeeman be and are hereby authorised to include the property in the inventory of assets in the administration of the Estate and to deal with the property in terms of the Act; and
5. Costs of suit at attorney and own client scale against the first respondent.

[16] I note that despite the obvious fact that the named third party has a clear and direct interest in the subject matter of the proceedings, he has either been cited or joined in these proceedings. This may well be that, as it

appears, the applicant does not seek to affect or challenge the said transfer but merely seeks an order compelling the first respondent to account for proceeds from the sale of the property in question to the said third party. I do however discern an inevitable adverse effect of an order cancelling and expunging the original transfer and registration of the the property in .the first respondent's name, to the said third party. It would legally negate and affect the derivative transfer of a subdivision (Portion 4) of the property to the third party.

- [17] Applicant avers that in so far as the first respondent was not authorised to acquire transfer of the property for his personal benefit to the excusion of the estate and the rest of the beneficiaries, the first respondents conduct of these transactions was as she terms them 'clandestine and fraudulent. She states further that his subsequent disposal of a protion of the property without s.ancion and approval by her as the Executor these transtions as well as any subsequent transactions were unlawful and prejudicial to the estate<sup>1</sup>. I do not see how in light of these material allegations in her application she would escape such adverse consequence from an invalidation of the original transfer of the property to the first respondent. It therefore appears to me that the third party is an affected and necessary party herein.
- [18] The Respondent vigorously opposes the application and in so doing deposed to an answering affidavit in which he contests the interest of the estate in the property in question whilst at the same time he asserts his own contesting right and interests in the property. In so doing he renders his own version as to how he came about to acquire the said property from the 2<sup>nd</sup> Respondent. He is supported substantially by the affidavits. of Messrs Tony Zeeman, Mathew Mabuza and Jim Magongo. Tony Zeeman is the first respondent's uncle. He has deposed to a confirmatory affidavit in which he essentially echoes the first respondent's version of the key facts tendered by the first and second respondents. The said Mabuza and Magongo are the Chairman and Secretary of the 2<sup>nd</sup> Respondent respectively. Likewise they have deposed to confirmatory affidavits in support of the first respondents in so far as the facts concern the 2<sup>nd</sup> Respondent.
- [19] From the first respondents' affidavits only a few in the pertinent background facts in this matter are matter of common cause. Primarily it is not disputed that the Zeemans took interest in the property in question in 1994 when it was still an undivided but surveyed part of the



original

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**1 See para 14 - 18 of founding affidavit but particularly para 22 thereof as it concerns the third party.**

Farm 1150. The farm has been since subdivided into various parcels of land including Portion 3 which was yielded by the partitioning of the original lease 6. Many of these subdivisional lots have been disposed off by the Co-operative. It is common cause that the said Portion 3 was disposed off for a sum of E137, 000.00 the only issue is to whom in the Zeeman family this property was 'sold'. This much emerges from the following opening passage at paragraph 19 in Mr Cedric Zeeman's affidavit. It essentially sets the tone and substance of his defence to the application:

**"AD PARAGRAPH 9 and 10**

**Save to admit that the purchase price of the aforesaid immovable property was the sum of E137, 500.00 .....the rest of the contents are vehemently denied as if specifically traversed and applicant is put on the strict proof thereof. In particular, it is denied that the said immovable property was purchased by the late Patrick Mozes Zeeman.**

**19.1 I wish to aver that the aforesaid immovable property was purchased by the then Transnational Bus Service (Zeeman's Business) from the 2<sup>nd</sup> Respondent sometime in 1994. The aforesaid company was represented by Nelson Stanislaus Zeeman otherwise known as Fishy and the 2<sup>nd</sup> Respondent was represented by its chairman, Mathew Mabuza.**

**19.2 I wish to further aver that when the aforesaid property was purchased, our late father had retired and signed his shares in the business to my younger brother Tony Zeeman sometime in the year 1993, and as such he had nothing to do with the acquisition of the immovable property. At the time of the aforesaid transaction the directors of the said company were: Robinson Martin Zeeman who was the Managing Director, and Nelson Stanislaus Zeeman, Jackson Daniel Zeeman and Tony Zeeman, were co-directors and shareholders ....."**

[20] A notable backdrop to these facts that is also common cause is that the personalities mentioned in 19.2 were the deceased brothers. Not much detail is offered by the first respondent as to the legal status of the so-

called Zeemans Business in the alleged transaction and apart from reference as to 'company' and 'buses business' the deponent tenders very little to substantiate these averments. In much similar vein he goes on to state at paragraph 20.1:

**20.1 I wish to aver that ever since the aforesaid property was purchased by the Zeeman's Business from the 2<sup>nd</sup> Respondent, it was never transferred to my father; neither had it been attempted to be transferred to him.**

**20.2 At all material times, the property belonged to the aforesaid business until sometime in the year 2013, when my late uncle Robinson Zeeman gave it to me after a decision was reached by the Company's Directors that same be given to me since I was not part of the Buses Business.**

**20.3 I wish to further aver that according to my late uncle, the piece of land was just useless as they could not procure a Title Deed for it. My uncle advised me that if possible, I should procure a Ninety-nine (99) year lease and see what to do with it.**

*Disputes of Fact, factual disparities and Gaps and inconsistencies in the opposing versions in the Claims*

[21] A dispute arises in the competing versions and relative claims of the applicant on the one hand, and the first respondent on the other. It stems from the question as to who negotiated and concluded the oral agreement to secure the property that was yet to be subdivided and partitioned from the 2<sup>nd</sup> Respondent. Both premise their claims on 'ownership' of the property; the applicant asserting the acquisition of the said property by the estate of the deceased derives from the purchase of the property from the 2<sup>nd</sup> respondent during his lifetime whereas the second respondent claims to have acquired the said property from the family business company which in turn had purchased it from the 2<sup>nd</sup> respondent.

[22] The essence of the alleged wrong or fraud on the part of the first respondent at the expense of the estate is that not only that he facilitated the transfer of the estate to himself to the prejudice of the rest of the beneficiaries including the deceased's surviving spouse but that he betrayed the family trust by fraudulently misrepresenting to the

Registrar of Deeds that his acquisition of the said property. It is for this reason that the applicant in part of the final relief seeks the restoration of the property by enabling the reversal of the registration of transfer from the first respondent and to pass transfer to the estate.

[23] On the other hand the first respondent's defence is essentially to deny that he has ever been charged with handling any aspect of the administration of the deceased's estate and thus refutes the allegation that he somehow diverted and hived off an estate asset to benefit himself. But he does not end there he ventures more evidence to prove that he legitimately acquired the property by donation from the company that is vaguely referred to as 'Zeemans Business' or alternatively as Zeemans.

## THE ISSUES

[24] The issues that arise from this application are:

1. whether the applicant has demonstrated her locus standi in the sense of the existence of a legal right or interest held by her deceased father's estate to the property in question to be in contention for the injunctive relief sought? If so what the nature of that interest or right is;
2. If the answer to the question above is to the affirmative, whether she has made out a case for the final interdict in the form of a prohibitory and mandatory injunctions in relation to the property; and
3. The third turns on the legal validity of the transaction as pertains to the alleged 'purchase of land' contended by the applicant on the one hand and the 2<sup>nd</sup> respondent on the other; it being beyond dispute that the parcel of land was subject to some agreement and a transaction for its acquisition from the 2<sup>nd</sup> respondent involving the payment of a sum of E137,500.00 to the cooperative - 2<sup>nd</sup> Respondent.
4. There is the final collateral issue as to how the said property became the subject of a further and subsequent 'sale' and transfer to the first respondent if it had already been acquired by the company on his own version.

5. In so far as both protagonists to this dispute assert a right of ownership over the property deriving from a sale agreement - the issue is whether this agreement constitutes a valid sale of land agreement; and if not what the true character is and status of the agreement and what was the nature of any right or interest deriving therefrom.
6. Finally the question of joinder of the third party who has not been cited looms large behind this matter.

#### POINTS OF LAW

#### URGENCY

(25] At the inception of the hearing the first respondent's attorney raised a series of what was presented as preliminary points of law taken by the first respondent in his answering affidavit. Firstly he raised the issue of urgency - contending that, if regard is had to the timeline of the events giving rise to this application, there were no grounds to merit the enrolment of the matter on urgency. There is a point to be made in this regard had the objection been brought when the matter was first enrolled for the interlocutory interdicts before the parties made an consensual order for the interim relief (PART A) pending the hearing of the main application for final interdict. It can now be only of relevance practically as regards questions of costs and any submissions the respondents may wish to make in that regard. Until then I reserve judgment on this aspect until the final outcome of this application.

#### A CLEAR OR PRIMA FACIE RIGHT

(26] The respondent has also raised as a second preliminary point the contention that applicant has failed to establish a clear or prima facie right as a pre-requisite step for the final interdictory relief she seeks. As the applicant acts in a nominal capacity it is accepted that this objection is attributed to the merits of the estates claim. I understand this to mean the applicant has failed to disclose an actionable cause in the averments set out in her affidavit - a lack of a prima facie right whose infringement is either alleged to have occurred or reasonably apprehended to ground an interdict.

## DISPUTES OF FACT

- [27] Finally the first respondent has further submitted that there exists several obvious disputes of fact on issues so central to the application that- the applicant should have anticipated from the inception of the application, It is therefore submitted by the respondents that on these premises the application should be dismissed with costs,
- [28] I propose to deal firstly with the aspect pertaining the existence or otherwise of a legal right or interest and finally the issue of disputes of fact in that order at this point

### *Legal Right or Interest*

#### **Sale of Land/ Ownership**

- [29] Both parties proceed on the proposition that either the deceased or the late Mr Stanislaus (on behalf of the company) entered into an oral sale agreement to purchase the property from the 2<sup>nd</sup> Respondent The immediate issue that arises is whether these propositions are viable and sound in law, Can oral agreement constitute a valid sale of land? Could there have been a valid sale of land on either version?
- [30] By definition a sale contract entails an agreement in terms of which one party binds himself to the other to deliver a thing (the merx) for specified sum of money (the price) and the other promises to pay to the seller the agreed price in exchange, It follows therefore that a contract of sale must include an agreement upon the merx, price and an obligation on the seller to deliver the merx or thing to the buyer, Section 31 of the Transfer Duties Act of 1902 provides as follows:

*"No contract of sale of fixed property shall be of any force and effect unless it is in writing and signed by the parties thereto or by their agents duly authorised in writing"*

- [31] The above section is reminiscent of the old South African Transfer Duty Proclamation 8 of 1902 of the then Transvaal. It is identical in wording to section 2 of the colonial ordinance, A similar but differently worded provision in the current South African Alienation of Land Act of 1981 which is broader in scope in so far as it relates to all formal means of disposition of land either by 'sale, exchange or donation', In that act the pertinent provision is section 2(1) provides as follows:

*"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority"*

- [32] All the section in the transfer duties act sets out the pre-requisite formalities for the registrability of rights in regard to fixed property. It does not render oral sale agreements or any agreements creating personal rights in respect of fixed property invalid or unenforceable in personam. An oral agreement in relation to a fixed property is capable of giving rise to legally valid and enforceable rights and obligations as between the immediate parties - personal as opposed to real rights. In *Registrar of Deeds (Tvl) v Ferreira Deep Ltd* 1930 AD 169 (Ferreira Deep Ltd) Lord De Villiers CJ remarking on this class of rights termed them *jura in personam ad rem acquirendam* (personal rights to delivery of things) at page 180 describes these rights as follows:

*"that person rights, jura in personam, are not capable of registration is a truism. The definition of such rights excludes their registration. But that does not apply to the class of personal rights which are known as jura in personam ad rem acquirendam. As contracts, with a few exceptions, give rise only to personal rights this class of right, although relating to immovable property, is a personal right until registration, when it is converted into a real right by such registration"*

#### *Not A Contract of Sale*

- [33] It is quite clear that the type of agreement the applicant and first respondent rely on for their competing claims does not qualify as sale of land agreement in light of the provisions in the Transfer Duties Act. It's a far cry from the claims of ownership or a registrable real right that they assert. One reason it cannot be a sale is that it lacks the essentialia of a merx or a defined thing in so far as the undivided but surveyed property although determinable, did not constitute a viable unit of land independent an 'stand-alone' entity outside of the said Farm 1150. It is common ground that it did not have a certificate of registered title or title deed to be a thing. Another reason is that unless in writing and signed by the parties to the agreement such transactions do not constitute valid sale agreements. Nor do they constitute registrable rights for want of the requisite formalities in terms of the Transfer Duties Act. At best they seek to assert an agreement giving

rise to a personal right to claim delivery of the property in question from the 2<sup>nd</sup> Respondent.

- [34] The statement attributable to **Lord De Villiers** in the ***Ferreira Deep Ltd*** case above holds true to oral agreements relating to fixed property. Thus the respective claims of the parties in casu being oral agreements can ostensibly give rise to a valid sustainable cause of action or an actionable claim against the 2<sup>nd</sup> respondent.
- [35] An example of such a claim (based on a *ius in personam* as *rem acquirendam*) explaining the character of such claims was given by Ward J more than a century ago in the case **White v Collins 1914 WLD 35 at 37** and cited with approval by **Greenberg JA in Du Plessis v Ne/ 1952 (1) SA 513 (A) at 526H-527B<sup>2</sup>** when the court echoed Ward J to the effect that 'a promise by A to hold freehold property registered in her name in trust for B is a contract to deliver such a property on demand, and is not a contract of sale of fixed property as contemplated in the Transvaal Transfer Duty Proclamation of 1902'.<sup>3</sup>
- [36] From the principles explored above it is clear that the nature of the propositions asserted by both the applicant and the first respondent which are predicated on a sale of the property are misconceived. They could only presume to proceed on the basis of the existence of a right to delivery or transfer of the property. That is the nature of the primary claims on which their claims are premised. First respondent stands in no better position from that of the applicant. The applicant claims such an obligation has devolved from the deceased's personal rights to the estate whilst on the other hand the first respondent asserts it originated to an obligation to pass transfer to a company which in turn 'donated the land to him'. All said I am satisfied that the applicant has set out a prima facie case for *ius in personam ad rem acquirendam* not a right of ownership. It is that case that stands to be tested. The point on lack of a legal right or interest to ground an interdict is therefore dismissed.

### *Disputes of Fact*

- [37] From the affidavits there arises significant disputes of fact which in my view several but circumscribed in scope. The main contentious issue which emerges concerns whether it was the deceased (the late Mr Patrick Zeeman) or the late Stanislaus (acting on behalf of a company)

<sup>2</sup> See **Loggenberg N.O. & Others v Maree (286/2017) [2018] ZASCA 24 (23 March 2018)** at paragraph 19.

<sup>3</sup> Section 30 of the Transvaal Transfer Duty Proclamation of 1902 (similar to section 31 of the Transfer Duties Act 1902 in our statutes (*idem*)).



that entered into an oral agreement in terms of which the property identified as Lease 8 (later Portion 3) of Farm 1150 was reserved for purchase- whence the right to claim delivery ostensibly derives.

- [38] The first respondent has gone further than deny or contest the applicant's version or averments to proffer an alternate or competing version. He is supported by the officers of the 2<sup>nd</sup> Respondent who, against the evidence of a letter and a deposit slip pointing to an agreement with the deceased, have not only denied the existence of the alleged oral agreement between the 2<sup>nd</sup> respondent and the deceased, but now seek to disavow the contents of the letter Annexed as 23 to the Applicants Founding Affidavit. They have alleged that letter was induced or procured by means fraudulent misrepresentations by the applicant. The Chairman and Secretary of the 2<sup>nd</sup> Respondent have both elected to support the first respondent who claims to have received the property from the company by way of donation. Curiously no documentary evidence has been adduced to prove such donation apart from another confirmatory affidavit deposed to by one Tony Zeeman, the surviving uncle of the first respondent and the applicant. No company documents or deed of donation have been placed before the court in this regard. These are all fundamental aspects of the core dispute of fact which can only be properly investigated if oral evidence is elicited enabling the proper testing of the evidence on affidavit against the credibility of the various witnesses who have deposed to the affidavits are called to give *viva voce* evidence.

#### *Registration*

- [39] The first respondent 's case is further confounded by the unclear circumstances and inconsistencies in his case presented before this court in his averments and certain documents placed of record pertaining to his acquisition of the property. In this regard there is a Deed of Sale as evidence of an agreement of sale over the same property entered into between him and the 2<sup>nd</sup> Respondent as well as a Deed of Transfer of the said property to him which both interpose the existence of another tier of transactions pertaining to the property from which he claims title - beyond the donation of the said property to him.
- [40] The first respondent's explanation of these circumstances and how he come to procure the property by way of a deed of sale is inconsistent with his assertion which he maintains throughout his answering affidavit which is supported by Mr Tony Zeeman in the latter's

confirmatory affidavit, that he property was donated to him by the his

other late uncle Mr Robinson Zeeman on behalf of the company. In this regard paragraph 23.2 of the first respondent's answering affidavit brings the incogruities in Mr Cedric Zeeman's case and version into sharper relief. He says:

*"I wish to reiterate that at all material times since the year 2013 when the aforesaid piece of land ws given and/or donated to my by the Zeemans Business through its managing director, the late Robinson Zeeman, I have been the owner of the same, working towards the acquisition or its documents for over seven (7) years until sometime in October 2019 wherein it was succesfully registered in my name".*

- [41] The statement begs the question how conceivably the said property had been "sold" to the said company in 1994 for E137, 500.00 and in due course fell into the hands of the company, then again was donated in 2013 to the first respondent by the said company - the same property became the subject of a purported sale between the 2<sup>nd</sup> respondent and the first respondent.
- [42] The inconsistencies and anomalies in the first respondents evidence on affidavit as well as that of the confirmatory affidavits tendered by Messrs Mabuza and Magongo (the Chairman and Secretary of the Co operative Society) abound when considered against the various documents annexed in the papers, which are common cause. These documents have to do with the survey, purported deed of sale, valuation and ultimately transfer of the property to the first respondents. These papers are of significance to the proceedings and the veracity of the first resondent and the other deponents statements deposited in this application and unless these persons are called and examined orally the questions shall remain unanswered.
- [43] The above are some features of the fundamental issues and disputes of fact emerging from the papers. They turn on pertinent factual circumstances and I agree that they all turn on which of the versions of the matter between that of the applicant and the first respondent is to be believed but I do not agree that these are so manifold and diverse that they cannot be resolved by way of oral evidence and cross examination of the deponents and other key witnesses to test and evaluate the veracity of the statements on oath by these witnesses. I therefore think these issues are capable of proper examination, investigation and finally resolution upon further oral and or documentary evidence and submissions.

Rule 6 (17) and (18) provides as follows in the event of irresolvable disputes of fact in applications:

(17) Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision.

(18) Without prejudice to the generality of sub-rule (17), the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

[44] For the reasons I have outlined above I am inclined in the interest of just and expeditious determination of the issues within the framework of these proceedings subject to appropriate directions as to the conduct of the matter, to refer the foremost core issues emerging from the papers to trial and the hearing of *viva voce* evidence.

There is also the question that appears to have been glossed over by the parties - that is the interest of the third party that I refer to in paragraphs 14, 16 and 17 above as regards the non-joinder of the said third party in these proceedings as a necessary party. I shall leave that issue to be dealt with in due course in the context of the orders I hereby make for the further conduct of these proceedings. I am mindful that in terms of Rule 33 (4) this court is empowered to direct that a trial over a question of fact in such a manner as deemed meet by the Court pending the determination of any question of law over and that the proceedings be held over pending such trial.

#### *Order*

[45] In the circumstances I therefore make the follows order:

1. I order that the matter go to trial; subject to the following directives:

1.11 direct that the third party and holder of deed of transfer  
DT 17/2020 in respect of Portion 4 (A portion of Portion 3)

be hereby served with judicial notice of the proceedings comprising the application, the answering confirmatory and replying affidavits and other documents filed as of record thus far be;

1.2 That the parties either file a joint statement of the issues or file separate statements in the form of a declaration, plea and replication (if any) to frame and define the issues provided the issues do not travel outside the scope of the issues contained in the averments on affidavits filed;

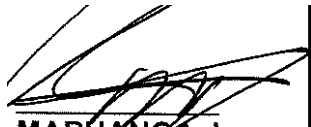
1.3 That the deponents to the affidavits thus far filed are hereby ordered to appear before the court to give viva voce evidence subject to the right by either party to subpoena any other person as a witness as pertains the issues as defined in the proceedings;

1.4 That in lieu of discovery the documents filed by the parties as of record as annexures to affidavits and any other pertinent documents that either party may seek to rely on; I direct as follows:

1.4.1 That the pertinent documents including the statutes as concerns the registraton, directorship, resolutions of the company referred to as Zeeman Business be included and compiled into a joint indexed and paginated bundle of documents;

1.4.2 Any other pertinent documents including the Master of the Office reports in relation to the Estate No. EH 19/2007 of the Late Mr Patrick Moses Zeeman be included in the aforesaid bundle.

2. Costs of the application shall be res\_erved to be determined in the final outcome in the proceedings.



**MAP J**  
**JUDGE OF THE HIGH COURT**

Appearances:

For the Applicant :

Mr. N. Tsambokhulu

For the Respondents :

Mr. T.N. Nsibandze